

10-3270-cv

10-3342-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

VIACOM INTERNATIONAL, INC., COMEDY PARTNERS,
COUNTRY MUSIC TELEVISION, INC., PARAMOUNT PICTURES CORPORATION,
BLACK ENTERTAINMENT TELEVISION, LLC,

Plaintiffs-Appellants,

—against—

YOUTUBE, INC., YOUTUBE, LLC, GOOGLE, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF AMICUS CURIAE,
AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION,
IN SUPPORT OF NEITHER PARTY**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus curiae* certifies the following information:

The American Intellectual Property Law Association (“AIPLA”) is a not-for-profit bar association for intellectual property law attorneys; it has no parent corporation, and no publicly held company owns 10% or more of AIPLA’s stock.

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I. INTEREST OF *AMICUS CURIAE*¹

The AIPLA is a national bar association of approximately 16,000 members engaged in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly and indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. AIPLA members represent both owners and users of intellectual property rights.

AIPLA has no interest in any party to this litigation. Nor does AIPLA have a stake in the outcome of this case, other than its interest in seeking a correct and consistent interpretation of the administration of the copyright laws. This brief is filed with the consent of the parties to this dispute.

II. SUMMARY OF ARGUMENT

AIPLA takes no position on who should prevail on the present facts. However, AIPLA urges this Court to affirm the district court's holding that more than a generalized knowledge of infringement is required to deprive an Internet

¹ After reasonable investigation, AIPLA believes that (a) no member of its Board or Amicus Committee who voted to prepare this brief, or any attorney in the law firm or corporation of such a member, represents a party to this litigation, (b) no representative of any party to this litigation participated in the authorship of this brief, and (c) no one other than the AIPLA, or its members who authored this brief and their law firms or employers, made a monetary contribution to the preparation or submission of this brief. Some committee members or attorneys in their respective law firms or corporations may represent entities which have an interest in other matters which may be affected by the outcome of this litigation.

service provider (“ISP”) of the protection of the safe harbor provisions of the Digital Millennium Copyright Act (“DMCA”). The district court correctly held that the DMCA requires either “actual knowledge” of specific instances of infringement, or awareness of “facts or circumstances” from which specific instances of infringing activity are apparent. Whether based on actual knowledge or awareness of facts or circumstances, the level of knowledge that is sufficient to strip the ISP of its protection under Section 512 of the Copyright Act, as amended by the DMCA is knowledge of specific instances of infringement. The district court’s holding is consistent with the legislative history of the DMCA and relevant case law. AIPLA urges this Court to reject Viacom’s broad attempt to deprive Internet service providers of the benefits of the safe harbor provisions of the DMCA based on generalized knowledge that infringing activity is occurring on a site.

AIPLA further urges this Court to clarify that conduct of the type that would violate the standards set forth in *Grokster*, under certain circumstances, may constitute “awareness” for purposes of Section 512(c) and result in forfeiture of the safe harbor protection under that provision.

III. BACKGROUND

Defendant, YouTube, operates a website to which Internet users may upload and store video files available for viewing by other Internet users. Congress

enacted procedures in the Digital Millennium Copyright Act to facilitate the policing of copyright infringements on the Internet without unduly burdening Internet service providers. Those procedures provide qualifying service providers with a safe harbor from infringement liability.

Viacom followed the DMCA procedures to give YouTube notice that its copyrighted videos had been placed on the YouTube site and to demand that they be removed. Although YouTube promptly removed the videos contained in Viacom's notices, Viacom filed suit for infringement, alleging tens of thousands of videos on YouTube and hundreds of millions of views. It argued that YouTube was not entitled to safe harbor protection from liability because it had a generalized knowledge that infringement was occurring on its site. Such generalized knowledge, it contended, was sufficient to establish both YouTube's "actual knowledge" of the infringements and its "awareness of facts or circumstances from which infringing activity was apparent."

The district court granted a summary judgment for YouTube, rejecting Viacom's argument that "generalized knowledge" could be a basis for denying the DCMA safe harbor protection. It held that the "actual knowledge" or "awareness" elements in the DMCA are directed to specific instances of infringement, not to a generalized knowledge of infringing activity.

The district court recounted at length pertinent portions of the legislative history of the DMCA, specifically noting that the Act creates a series of safe harbors for Internet service providers. The district court specifically referenced portions of the legislative history identifying that, in addition to the Internet service providers' subjective knowledge ("aware of facts or circumstances"), infringing activity would have to have been apparent to a reasonable person operating under the same or similar circumstances, an objective test. The district court noted that the House and Senate Reports, House Committee on Commerce Report, H.R. Rep. No. 105-551, pt. II (1998) ("House Report"), and Senate Committee on the Judiciary Report, S. Rep. No. 105-190 (1998) ("Senate Report"), specifically identified that the requisite degree of knowledge is either actual knowledge, or circumstances constituting a "red flag," of specific infringing activity. The district court continued, noting that the DMCA imposed no obligation on Internet service providers to seek out instances of copyright infringement. Rather, in order to qualify for the safe harbor provision, the Internet service provider must not have actual knowledge that the material is infringing and must not be aware of facts or circumstances from which the infringing activity is apparent.

Among the "red flags" that could constitute being aware of facts or circumstances from which the infringing activity is apparent, the court noted portions of the House and Senate reports identifying as "red flags" downloads from

pirated sites that are apparent on their face. The district court concluded that both the “actual knowledge” and “facts or circumstances” elements of the DMCA safe harbor provision require knowledge of specific and identifiable infringements of particular copyrighted items. Knowledge that infringing activity is prevalent on a site is not sufficient.

The district court correctly held that either actual knowledge of specific instances of infringement or knowledge of facts or circumstances from which specific instances of infringement are apparent is required. The “actual knowledge” and “awareness of facts or circumstances” elements are separate tests; each must be satisfied in order for the Internet service provider to establish “safe harbor” protection.

IV. ARGUMENT

AIPLA urges this Court to clarify the respective rights of Internet service providers and copyright owners pursuant to the Digital Millennium Copyright Act, Public Law 105-304, codified at 17 U.S.C. § 512. Section 512(c) provides a “safe harbor” to Internet service providers who receive notice of infringing content being posted on their sites and who act promptly thereafter, pursuant to the requirements of Section 512, to remove or disable the alleged infringing content.

The issue presented in this case is important—whether generalized knowledge that infringing activity occurs on a site is sufficient to establish either

“actual knowledge” that the material is infringing or awareness of “facts or circumstances” from which infringing activity is apparent. Substantial rights and substantial monetary interests are at stake. The balance between content providers and Internet service providers was the subject of vigorous public debate at the time the DMCA was passed, and the DMCA embodies Congress’s decision about where to draw this line. This specific issue has not been addressed and resolved by this or other circuits.

This case raises the issue of whether an Internet service provider loses the protections of the safe harbor provisions of the DMCA as a result of generalized knowledge that infringing activity occurs on its site. Does the loss of protection under the DMCA require merely generalized knowledge or, rather, as the district court held, does it require either actual knowledge or awareness of facts or circumstances regarding specific instances of infringement? And, further, whether it requires “actual knowledge” or “awareness,” did the district court articulate the correct standard of “knowledge” or “awareness?”

Although the district court correctly held that specific instances of infringement are required, it erred in evaluating the “awareness” element, essentially equating it with “actual knowledge.”

A. The District Court Correctly Held that the Requirement for Specificity Applies to Both the “Actual Knowledge” and “Aware of Facts or Circumstances” Prongs of the Knowledge Standard Under Section 512

Viacom argues that the district court erred in holding that the DMCA requires either actual knowledge of specific acts of infringement, or awareness of awareness of facts or circumstance from which specific instances of infringing activity is apparent. AIPLA submits that the district court’s holding is consistent with the DMCA and applicable case law.

The House and Senate Reports include identical language with respect to the applicable knowledge standard. They make it clear that Congress intended that knowledge of facts or circumstances be of specific instances of infringement and not generalized knowledge:

Subsection (c)(1)(A)(ii) [awareness of facts or circumstances from which the infringing activity is apparent] can best be described as a “red flag” test. As stated in subsection (l), a service provider need not monitor its service or affirmatively seek facts indicating infringing activity (except to the extent consistent with a standard technical measure complying with subsection (h)), in order to claim this limitation on liability (or, indeed any other limitation provided by the legislation). However, if the service provider becomes aware of a “red flag” from which infringing activity is apparent, it will lose the limitation of liability if it takes no action. The “red flag” test has both a subjective and an objective element. In determining whether the service provider was aware of a “red flag,” the subjective awareness of the service provider of the facts or circumstances in question must be determined. However, in deciding whether those facts or circumstances constitute a “red flag”— in other words, whether infringing

activity would have been apparent to a reasonable person operating under the same or similar circumstances—an objective standard should be used.

Subsection (c)(1)(A)(iii) provides that once a service provider obtains actual knowledge or awareness of facts or circumstances from which infringing material or activity on the service provider's system or network is apparent, the service provider does not lose the limitation of liability set forth in subsection (c) if it acts expeditiously to remove or disable access to the infringing material. Because the factual circumstances and technical parameters may vary from case to case, it is not possible to identify a uniform time limit for expeditious action.

Senate Report at 44-45; *See also* House Report at 53-54.

The House and Senate Reports provide a compelling example of how generalized knowledge, even when delivered directly to the service provider, is not sufficient: delivery of a defective notice, i.e., one that does not substantially comply with the formal requirements of the Act, will not deprive the provider of the safe harbor. In this case, the service provider not only had generalized knowledge, it also may have had enough information to identify the infringing activity itself, with minimal additional investigation. Yet, even this level of generalized knowledge, as the legislative history makes clear, is not sufficient:

Subsection (c)(3)(B) addresses the effect of notifications that do not substantially comply with the requirements of subsection (c)(3). Under this subsection, **the court shall not consider such notifications as evidence of whether the service provider has actual knowledge, is aware of facts or circumstances**, or has received a notification for purposes of subsection (c)(1)(A). However, a defective notice provided to

the designated agent may be considered in evaluating the service provider's knowledge or awareness of facts and circumstances, **if (i) the complaining party has provided the requisite information concerning the identification of the copyrighted work, identification of the allegedly infringing material**, and information sufficient for the service provider to contact the complaining party, and (ii) the service provider does not promptly attempt to contact the person making the notification or take other reasonable steps to assist in the receipt of notification that substantially complies with paragraph (3)(A). If the service provider subsequently receives a substantially compliant notice, the provisions of paragraph (1)(C) would then apply upon receipt of the notice.

Senate Report at 46-47 (emphasis added); *See also* House Report at 55-56.

Congress's focus on both actual knowledge and awareness of facts or circumstances from which infringing activity is apparent demonstrates that the knowledge requirement is directed to the ability to identify specific instance of infringement. Generalized notice to the service provider is insufficient under Section 512(c)(1)(A)(ii).

More importantly, Congress emphasized that the service provider is under no obligation to seek out evidence of copyright infringement. With respect to Section 512(d), the Report states:

Like the information storage safe harbor in section 512(c), a service provider would qualify for this safe harbor if, among other requirements, it "does not have actual knowledge that the material or activity is infringing" or, in the absence of such actual knowledge, it is "not aware of facts or circumstances from which infringing activity is apparent." Under this standard, a service provider would have no obligation to seek out copyright infringement, but it would not

qualify for the safe harbor if it had turned a blind eye to “red flags” of obvious infringement. For instance, the copyright owner could show that the provider was aware of facts from which infringing activity was apparent if the copyright owner could prove that the location was clearly, at the time the directory provider viewed it, a “pirate” site of the type described below, where sound recordings, software, movies or books were available for unauthorized downloading, public performance or public display. Absent such “red flags” or actual knowledge, a directory provider would not be similarly aware merely because it saw one or more well known photographs of a celebrity at a site devoted to that person.

* * *

The important intended objective of this standard is to exclude sophisticated “pirate” directories—which refer Internet users to other selected Internet sites where pirate software, books, movies, and music can be downloaded or transmitted—from the safe harbor. Such pirate directories refer Internet users to sites that are obviously infringing because they typically use words such as “pirate,” “bootleg,” or slang terms in their uniform resource locator (URL) and header information to make their illegal purpose obvious to the pirate directories and other Internet users. Because the infringing nature of such sites would be apparent from even a brief and casual viewing, safe harbor status for a provider that views such a site and then establishes a link to it would not be appropriate.

* * *

In this way, the “red flag” test in section 512(d) strikes the right balance. The common-sense result of this “red flag” test is that online editors and catalogers would not be required to make discriminating judgments about potential copyright infringement. If, however, an Internet site is obviously pirate, then seeing it may be all that is needed for the service provider to encounter a “red flag.” A provider proceeding in the face of such a red flag must do so without the benefit of a safe harbor.

Senate Report at 48-49; *See also* House Report at 57-58. Congress having engaged in a full public debate and having made the policy decision that balances the interests affected by the DMCA, this Court should not judicially revise that balance. Although the district court correctly recognized this balance, its implementation in this case was erroneous in two fundamental and important ways.

B. By Approving the Ninth Circuit’s Holding in *CCBill*, The District Court Erred in Extending the Degree of Knowledge Required for “Awareness” Beyond That Established by Congress in Section 512(c)

In reviewing the case law on secondary liability, the district court noted that the Internet service provider has no duty to investigate. The district court cited with approval the Ninth Circuit’s holding in *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007). In so doing, however, the district court elevated the holding that the service provider has no duty to investigate in a manner that flatly contradicts the very examples of “red flags” provided by Congress in the legislative history.

In *CCBill*, the sites that were alleged to have constituted “red flags” were named: “illegal.net;” “stolencelebritypics.com;” and “password-hacking.com.” In spite of the obvious illegal nature of these names, and the lack of imagination required to divine their purpose, the Ninth Circuit in *CCBill* held that these colorful and explicit names were not “red flags.” The holding that these names were not

obvious enough to constitute a “red flag,” a holding that is endorsed by the district court in this case, irreconcilably conflicts with the specific examples of “red flags” that Congress expressly provided in the legislative history:

Such pirate directories refer Internet users to sites that are obviously infringing because they typically use words such as “pirate,” “bootleg,” or slang terms in their uniform resource locator (URL) and header information to make their illegal purpose obvious to the pirate directories and other Internet users. Because the infringing nature of such sites would be apparent from even a brief and casual viewing, safe harbor status for a provider that views such a site and then establishes a link to it would not be appropriate.

House Report at 57-58; Senate Report at 48-49. So too, in *CCBill*, the infringing nature of names such as “stolencelebritypics.com” is apparent from even a brief and casual viewing. Yet, the Ninth Circuit declined to so hold. The blatant site names in *CCBill* are precisely the type of indications of illegality that Congress expressly identified as constituting a “red flag.”

The Ninth Circuit’s erroneous holding in *CCBill* that such obvious examples cannot as a matter of law constitute a “red flag” elevates the proposition that the service provider has “no duty to investigate” to a point that encourages willful blindness, defies common sense, and contravenes the express intent of Congress. These are precisely the type of obvious indicators of illegality from which “awareness of facts or circumstances from which infringing activity is apparent” under Section 512(c).

Section 512(m) makes it clear that the availability of the safe harbor does not depend on the service provider's efforts to monitor its service or affirmatively seek facts indicating infringing activity. However, by elevating the lack of a duty to investigate to such extreme proportions, and adopting such a limited definition of "awareness" that ignores even the explicit red flags identified by Congress, the Ninth Circuit and the district court have effectively eliminated any viable distinction between "awareness" and "actual knowledge." This extreme interpretation of Section 512(m) and corresponding overly-narrow definition of "awareness" under Section 512(c) contravenes the express intent of Congress and is incorrect as a matter of law. Although awareness of specific instances of infringement are required, the service provider may not ignore the obvious.

That is precisely the point made by this Court in *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93 (2nd Cir. 2010), cert denied, 11/29/2010, in the context of trademark rights and online sales of counterfeit goods. "[I]f eBay had reason to suspect that counterfeit Tiffany goods were being sold through its website, and intentionally shielded itself from discovering the offending listings or the identity of the sellers behind them, eBay might very well have been charged with knowledge of those sales sufficient to satisfy *Inwood*'s 'knows or has reason to

know' prong."² Ironically, although the district court erred in supporting the *CCBill* holding, it also cited with approval this Court's holding in *Tiffany*. The district court's approval of *CCBill* cannot be reconciled with this Court's holding in *Tiffany*. Although generalized knowledge or awareness is insufficient, the service provider can neither ignore the obvious, nor can they act in a manner that is willfully blind to specific instances of infringement.

C. The Supreme Court's *Grokster* Decision Could Be Helpful in Applying DMCA's Safe Harbor Provisions in the Appropriate Case

The district court dismissed Viacom's attempt to use the Supreme Court's decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), to disqualify YouTube from the protections of the safe harbor provisions. It found that *Grokster* and its progeny involve neither Internet service providers nor the DMCA and thus have little application here. Although there is no denying the distinctions between *Grokster* and this case, the district court's categorical dismissal of the decision overlooks the usefulness that the *Grokster* Supreme Court opinion may have in future disputes over the DMCA's safe harbor.

While *Grokster* was decided under common law principles and this case turns on statutory provisions, both involve issues of secondary liability and both involve the policy of balancing strong copyright protection against limitations on

² See *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 102 S. Ct. 2182 (1982).

infringement liability that are designed to promote commerce and innovation in the digital age. While factually, *Grokster* is also distinguishable from this case in that it involved much more egregious conduct that weighed heavily in favor of providing rather than limiting copyright protection, this Court should make it clear that the kind of active inducement of infringement that produced secondary liability in *Grokster* would equally disqualify a defendant from the protections of the DMCA safe harbor provision.

V. CONCLUSION

For the foregoing reasons, AIPLA respectfully requests that the Second Circuit clarify that the “actual knowledge” and “aware[ness] of facts or circumstances from which infringing activity is apparent” requirements in the DMCA safe harbor provision both require identification of specific instances of infringement.

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